IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-130

COMMONWEALTH OF PENNSYLVANIA, by MILTON J. SHAPP, its Governor, et al.,

Petitioners,

v.

THOMAS S. KLEPPE, AS ADMINISTRATOR of the SMALL BUSINESS ADMINISTRATION, et al.,

Respondents.

FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE STATE OF NEW YORK, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PENNSYLVANIA'S PETITION

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BRIEF FOR THE STATE OF NEW YORK, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PENNSYLVANIA'S PETITION

This brief is submitted pursuant to Rule 42(4) of the Court's Rules by the States of New York, Alabama, Arkansas, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, Wyoming, and the Commonwealths of Massachusetts and Virginia and Territory of Guam, in support of the petition of the Commonwealth of Pennsylvania to obtain a writ of certiorari to review the opinion and judgment of the Court of Appeals for the District of Columbia entered on March 4, 1976.

Interests of the *Amici Curiae*

Each of these *Amici* is a sovereign state of the United States with a substantial interest in supporting Pennsylvania's petition for a writ of certiorari in this matter. The *Amici* are concerned with this action because the issues involved bear directly on their rights as states to protect their quasi-sovereign interests. The *Amici* believe that the decision of the Court of Appeals, which held that Pennsylvania lacked standing to seek relief as *parens patriae* for the harm caused its citizens by the unlawful administrative actions of certain federal officials, seriously and unduly restricts the well established right of states to utilize *parens patriae* lawsuits as a means for protecting the general welfare of their inhabitants.

This Court has long recognized the right of a state to sue as *parens patriae* to protect its quasi-sovereign interests. *Missouri* v. *Illinois,* 180 U.S. 208 (1901). Indeed, "[i]t has . . . become settled doctrine that a State has standing to sue [as *parens patriae*] only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania* v. *New Jersey,* 44 U.S.L. Week 4916, at 4917 (U.S. June 17, 1976). Included among the quasi-sovereign interests that a state may properly represent are the general health and welfare of its citizens and the continuing prosperity of its economy. *Georgia* v. *Pennsylvania Railroad Co.,* 324 U.S. 439 (1945); *Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1923); *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230 (1907). The Court most recently reaffirmed this principle in *Hawaii* v. *Standard Oil Co.,* 405 U.S. 251 (1972), where it was noted that "[t]he nature of the *parens patriae* suit has been greatly expanded in the United States beyond that which existed in England" (405 U.S. at 257).

The decision of the Court of Appeals holding that a state may not act as *parens patriae* to challenge unlawful administrative action of federal officials is therefore of special concern to the *Amici.* It places a narrow, restrictive interpretation upon traditional *parens patriae* concepts at the very time that the interests of local state governments require a strengthening and expanding of those concepts. Moreover, it comes in a period when traditional notions of standing in general have been considerably relaxed. *United States* v. *SCRAP,* 412 U.S. 669 (1973); *Sierra Club* v. *Morton,* 405 U.S. 727 (1972); *Data Processing Services* v. *Camp,* 397 U.S. 150 (1970); *Flast* v. *Cohen,* 392 U.S. 83 (1968).

Questions Presented

1. When the unlawful action of a federal agency causes harm or threatens injury to a state's quasi-sovereign interests, is the state precluded from bringing a *parens patriae* suit against the agency, where the suit does not challenge the Constitutional power of the Federal Government, but only seeks relief against the agency's unlawful actions?

2. Can a state be denied *parens patriae* standing to sue in any case where its quasi-sovereign interests are clearly established?

Statement of the Case

The Commonwealth of Pennslyvania has presented a full statement of the case in its Petition. For the broader overview which *Amici* take, the relevant facts can be succinctly stated.

Hurricane Agnes ravaged much of the eastern seaboard from June 21, 1972 to June 25, 1972. It was one of the worst natural disasters in the history of the United States.

Pennsylvania and its citizens suffered losses unparalleled in the history of that state and unparalleled by the devastation in other states. The Small Business Administration (SBA) was charged with the responsibility, pursuant to 15 U.S.C. § 631, of providing necessary assistance and disaster relief to those eligible persons and entities that had suffered losses as a result of the hurricane. In accordance with an internal classification system maintained by the SBA, whereby disasters are rated as either "A" or "B" disasters, Pennsylvania was classified as a "B" disaster area. Pennsylvania alleges that the SBA afforded top priority to "A" disasters and that those disasters receiving the "B" classification were accorded substantially lesser priority. As a result of the "B" classification it received, Pennsylvania alleges that SBA officials denied the state and its citizens the requisite professional personnel and administrative resources necessary to effectively administer and deliver disaster recovery assistance within the state. Pennsylvania further alleges that the SBA had classified other disasters as "A" which were, comparatively, minor and of significantly less impact than Hurricane Agnes. It is charged that this discriminatory classification and treatment of Pennsylvania caused harm and injury to its citizens, that it was not authorized by law, that it was done for the personal political reasons of the SBA Administrator, and that it was directly contrary to the Administrator's legally imposed duties.

The complaint in the action was filed against the SBA and its officials primarily to prevent the dismantling of SBA flood relief operations in Pennsylvania and to obtain a reopening of the SBA disaster relief loan program within that state. In addition to bringing the action on behalf of itself and upon relation of four named individuals harmed by the unlawful conduct of the SBA officials, Pennsylvania brought the action as *parens patriae* for all of its citizens, taxpayers, and residents. The District Court dismissed the action for lack of standing, and the

Court of Appeals, over the dissent of Senior Judge Lumbard, affirmed.

Reason for Granting the Writ

The decision of the D.C. Circuit is in direct conflict with a recent decision of the Ninth Circuit and is contrary to prior decisions of this Court

In denying Pennsylvania standing to sue, the majority opinion relied principally upon this Court's decision in *Massachusetts* v. *Mellon,* 262 U.S. 447 (1923), wherein it was stated that the United States, and not the state, represents a state's citizens as *parens patriae* in their relation with the federal government. While conceding that it was debatable whether that decision bars all state *parens patriae* suits against the federal government, the majority nevertheless held that *Mellon* makes clear that the federal interest will generally predominate. Turning its attention to the instant case, the Court of Appeals found that Pennsylvia's interest in the maladministration of the SBA disaster relief effort was too ambiguous to overcome the overwhelming federalism interest in preventing the undue disruption of federal powers and in keeping separate the state and national *parens patriae* functions.

The decision of the D.C. Circuit in this case denying Pennsylvania standing to challenge the maladministration of SBA relief efforts in that state is in direct conflict with the recent decision of the Ninth Circuit in *Washington Utilities & Transportation Commission* v. *FCC,* 513 F.2d 1142 (9th Cir.), *cert. denied,* 96 S. Ct. 62 (1975). In the latter case the Ninth Circuit concluded that the *Mellon* doctrine did not preclude a suit by an agency of the State of Washington challenging a determination of the Federal Communications Commission. As Judge Lumbard noted in his dissent below, this is a "squarely contrary holding" to that in the instant case (Slip Op., dissent, p. 5).

In *Washington Utilities,* it was alleged that the challenged FCC action would result in an increase of intrastate telephone rates and that a substantial portion of Washington's citizens would be affected thereby. The Ninth Circuit first determined that the necessary quasi-sovereign interest was present. The Court found that the state had an interest independent of its citizens consisting in "communication vital to the economic and social well-being of the community as a whole." *Washington Utilities & Transportation Commission* v. *FCC, supra,* at 1152. It then determined that none of the considerations that have justified restrictions upon the power of a state to represent the interests of its citizens as *parens patriae* were present in the case.

> The original jurisdiction of the Supreme Court is not invoked, and the availability of a remedy need not be restricted by the necessity of husbanding that court's limited resources. Since no state is sued, there is no threat of circumvention of the Eleventh Amendment. [citations omitted] Since no damages are sought, there is no risk of duplicating recoveries. [citation omitted] Since no absent persons will be barred from a remedy otherwise available if this petition is entertained, the proceeding is not subject to criticism as a substitute for a class action without its safeguards. [citations omitted] (513 F.2d at 1152-53)

Finally, the Ninth Circuit held that the doctrine of *Massachusetts* v. *Mellon* was not applicable to the situation before it. Unlike *Mellon,* where Massachusetts sought to litigate a "question of distribution of powers between the State and the national government," *Georgia* v. *Pennsylvania Railroad,* 324 U.S. 439, 445 (1945), and "protect her citizens from the operation of federal statutes," *Id.,* at 447, the Court noted that

> [Washington] does not attack the constitutionality of the Communications Act on any ground; rather it relies upon the federal statute, and seeks to vindicate the congressional will by preventing what it asserts to be a violation of that statute by the administrative agency charged with its enforcement. (513 F.2d at 1153)

The position of the State of Washington in the *Washington Utilities* case and that of the Commonwealth of Pennsylvania in the instant case are virtually identical. There is no sound basis upon which to distinguish the holdings in the two cases.

More importantly, a comparison of the opinion in *Washington Utilities* with that of the majority opinion below reveals that there is a basic irreconcilable conflict between the Ninth Circuit and the D.C. Circuit with respect to the way in which each court views the question of *parens patriae* standing. As noted above, the Ninth Circuit found that such standing existed, apart from any consideration of the *Mellon* doctrine, upon a showing of the necessary quasi-sovereign interest and an absence of any of the traditional reasons for restricting state *parens patriae* standing that have been advanced in cases brought under this Court's original jurisdiction, *See The Original Jurisdiction Of The United States Supreme Court,* 11 Stan. L. Rev. 665 (1959), or in connection with cases where states have attempted to represent the individual proprietary interests of their citizens outside the confines of a class action. *California* v. *Frito-Lay, Inc.,* 474 F.2d 774 (9th Cir. 1973). The majority opinion below, however, holds that *parens patriae* standing is not solely dependent upon the kind of injury alleged (*i.e.,* whether the harm is such as will give rise to a quasi-sovereign interest), but also on the identity of the defendant parties against whom the action is brought.

Thus, in the view of the majority below, "significant policy concerns, *apart from the injury itself,* become rele-

vant in determining the state's fitness to bring suit," (Slip Op., pp. 14, 15) (emphasis added). The majority notes that the presence of a state defendant provides added impetus to find standing to sue, because there is a clear policy which favors the resolution of interstate disputes. On the other hand, in actions against non-state defendants, where the resolution of interstate controversies are not at issue, analysis might indicate that standing should be denied, "even if the interest to be represented seems superficially similar to that held an adequate basis for standing in an interstate suit," (Slip Op., p. 16).

In short, the majority's approach to the question of *parens patriae* standing would focus the inquiry upon the perpetrator of the injury and away from the nature of the harm to the general welfare. Thus, even where the injury is substantial and the state's quasi-sovereign interest is otherwise clear, standing could still be denied.

The *Amici* contend that this view of *parens patriae* standing conflicts, not only with the views of the Ninth Circuit expressed in *Washington Utilities,* but also with the views expressed by this Court in every case in which *parens patriae* standing has been upheld. This Court has never denied standing to sue where the appropriate quasi-sovereign interest has first been demonstrated.

Thus, for example, in *Missouri* v. *Illinois,* 180 U.S. 208 (1901), where Missouri sought to enjoin the pollution of the Illinois River by the State of Illinois, *parens patriae* standing was upheld because it was clear that Missouri had an interest in protecting the health and prosperity of its towns and cities against the pollution's threatened hazards. "[I]t must surely be conceded," said the Court, "that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them." *Id.* at 241. Similarly, *parens patriae* standing was upheld in *Kansas* v. *Colorado,* 206

U.S. 46 (1907), where Kansas challenged the diversion of the Arkansas River by Colorado. The Court noted that the controversy involved "a matter of state interest, and must be considered from that standpoint." *Id.* at 99. In *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230 (1907), Georgia sought to enjoin the discharge of noxious gases over its territory. After finding that Georgia had "an interest independent of and behind the titles of its citizens, in all the earth and air in its domain," *Id.* at 237, the Court declared that "demands of this sort, on the part of a State, for relief from injuries analogous to torts . . . *must be recognized,* if the grounds alleged are proved • • •," *Id.* (emphasis added). In *New York* v. *New Jersey,* 256 U.S. 296 (1921), the Court upheld New York's interest in preventing the pollution of its waters, noting that "[t]he health, comfort and prosperity of the people of the State [of New York] and the value of their property being gravely menaced . . . the State is the proper party to represent and defend such rights • • •," *Id.* at 301-302. Likewise, in *Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1923), the Court upheld the standing of Pennsylvania and Ohio to challenge West Virginia's interference with the flow of natural gas into their territories. The Court found that the two states had an interest in protecting the health, comfort and welfare of their citizens from the threatened withdrawal of natural gas from the interstate stream. It stated that

> [t]his is a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected [which] is not merely a remote or ethical interest but one which is immediate and recognized by law. (*Id.* at 592)

Finally, in Georgia v. *Pennsylvania Railroad,* 324 U.S. 439 (1945), the Court upheld Georgia's standing to seek relief for injury to her economy and to the general welfare of

her citizens caused by discriminatory shipping rates. It noted that

> Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. (*Id.* at 451)

The rule which emerges from the foregoing line of cases is that a state may properly assert *parens patriae* standing in any action where the injury alleged is shown to affect the general public welfare of its citizens. It is clear that *parens patriae* standing in such cases is not in any way dependent upon the identity of the defendant parties against whom the action is brought, but solely upon the nature of the harm alleged. To the extent that the Court of Appeals decision holds otherwise, it is in conflict with the prior decisions of this Court.

The *Amici* further contend that the Court of Appeals decision is in conflict with the decisions of this Court in *Oregon* v. *Mitchell,* 400 U.S. 112 (970); *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966); and *New York* v. *United States,* 65 F. Supp. 856 (NDNY 1946), *aff'd* 381 U.S. 284 (1947), in each of which cases state standing to sue the federal government on behalf of proper quasi-sovereign interests was not questioned.

It is important, therefore, that a writ of certiorari be granted in this case. The decision of the Court of Appeals for the D.C. Circuit in the instant case is in direct conflict with the views of the Ninth Circuit and is also contrary to principles laid down by this Court in several prior cases. It is important to the *Amici,* and to the interests of federalism, that these conflicts be resolved.

CONCLUSION

For all of the reasons set forth above, *Amici* respectfully request that a writ of certiorari issue to the Court of Appeals for the District of Columbia to resolve a serious issue of federalism that is of grave importance to the states and the general welfare of the citizens they represent.

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